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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI, Petitioner,

Vs.

No. 80-997

TOMMY BRYANT KENDRICK, Respondent,

MOTION AND SUGGESTIONS

FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, TOMMY BRYANT KENDRICK, by counsel, hereby moves the Court for its order allowing the respondent to proceed in this case in forma pauperis.

As grounds for this motion, the respondent states as follows:

1. On or about December 15, 1980, petitions for writs of certiorari, including a petition with regard to the respondent, were docketed in the above case and assigned the above number.

The last information received by the undersigned counsel was that the respondent Kendrick was incarcerated in a penal institution in the state of Kansas, completing service of a sentence imposed on him in that state, with detainers filed on him by California and Missouri for convictions in those states.

2. On best information and belief, the respondent is unable to pay the costs and expenses required or necessitated in responding to the petition for writ of certiorari and any other subsequent proceedings.

3. The respondent was determined to be an indigent by the courts of the State of Missouri and was appointed counsel to represent him and allow to proceed in forma pauperis in connection with all proceedings before the courts of that state.

4. On best information and belief and from personal observation, the respondent is not learned in the law and is unable to personally prepare a response to the petition for writ of certiorari or to represent himself in any subsequent proceedings.

5. The undersigned is attempting to obtain an affidavit of poverty from the respondent to file in support of this motion and if the undersigned is able to obtain such and affidavit will immediately forward it to this court.

WHEREFORE, the respondent prays that the court allow him to proceed in forma pauperis and to grant him such other relief as is deemed necessary and proper.

Respectfully submitted,

David Robards. pch

DAVID ROBARDS
PUBLIC DEFENDER

201 JASPER COUNTY COURTS BUILDING
SIXTH AND PEARL STREETS
JOPLIN, MISSOURI 64801
(417) 781-4114

ATTORNEY FOR RESPONDENT

I hereby certify that a true and correct copy of the foregoing was hand-delivered this _____ day of March, 1981 to: Paul R. Otto, Chief Counsel, Criminal Division, Attorney General's Office, Jefferson City, Missouri.

Paula Howell

AFFIDAVIT

I, David Robards, upon my oath, hereby state as follows:

1. I am the duly appointed public defender for the 29th Judicial Circuit of Missouri which is coextensive with the boundries of the County of Jasper, Missouri.

2. My office was appointed to represent the respondent during all proceedings before the courts of the State of Missouri after the respondent was found to be unable to afford counsel or pay other costs and expenses.

3. On best information and belief and from personal observation, the respondent is not learned in the law and is unable to represent himself in connection with this case.

4. On best information and belief, the respondent is presently incarcerated in a state institution either in Kansas, California or Missouri.

These things are true and correct and further the affiance saith not.

David Robards

DAVID ROBARDS

Subscribed and sworn to before me this ____ day of March, 1981.

Paula Howell

Paula Howell, Notary Public

My commission expires: April 27, 1984.

IN THE

SUPREME COURT OF THE UNITED STATES

| | | |
|---|---|---|
| STATE OF MISSOURI, | Petitioner, ) | |
| Vs. | ) | No. 80-997 |
| TOMMY BRYAND KENDRICK, | Respondent, ) | |

AFFIDAVIT OF RESPONDENT

The respondent, TOMMY BRYAND KENDRICK, upon his oath, hereby states the following:

1. I am presently incarcerated within the Kansas Department of Corrections and am withouth funds to pay for the costs and expenses involved in the is case.

2. I was granted leave to proceed as a poor person by the State of Missouri with regard to the case for which a writ of certiorari is sought.

3. I am not learned in the law and am unable to represent myself in this action.

I swear that the above things are true and correct.

Tommy B. Kendrick
TOMMY BRYANT KENDRICK

Subscribed and sworn to before me this 17th day of March, 1981.

WILLIAM L. SHODGRASS
Leavenworth County, Ks.
My Appt. Exp. 1-22-87

Notary Public

My commission expires: 3-26-83.

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OCTOBER TERM, 1980

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NO. 80-997

STATE OF MISSOURI,

Petitioner

Vs.

TOMMY BRYANT KENDRICK, AET AL

Respondent

BRIEF IN OPPOSITION

TO GRANTING PETITION FOR WRIT OF CERTIORARI

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DAVID ROBARDS
PUBLIC DEFENDER

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ATTORNEY FOR RESPONDENT

## TABLE OF AUTHORITIES


Blockburger v. United States, 284 U.S. 299 (1932);

Brinkley v. Michigan, _____ U.S. _____ (1979);

Eastlake v. Forrest City Enterprises, Inc., 426 U.S. 668 (1976);

Elmore v. State, 382 N.E.2d 893, 894-95 (Ind. 1978);

Garner v. Louisiana, 368 U.S. 157 (1961);

Harris v. Oklahoma, 433 U.S. 682 (1977);

Hunter v. State, 420 A.2d 119 (Del.Supr. 1980);

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1973);

Missouri v. Sours, _____ U.S. _____ (1981);

Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972);

North Carolina v. Rice, 404 U.S. 244 (1971);

O'Brien v. Skinner, 414 U.S. 524 (1973);

Sours v. State,593 S.W.2d 208 (Mo.Banc 1980);

Sours v. State, 603 S.W.2d 592 (Mo.Banc 1980);

State v. Crate, 493 S.W.2d 1 (Mo.Ct.App. at St.L. 1973);

State v. Frey, 459 S.W.2d 359 (Mo. 1970);

State v. Kendrick, 606 S.W.2d 643 (Mo. 1980) (advance sheet)

United States v. DiFrancesco, 66 L.Ed.2d 328 (1980);

Wayne County Prosecutor v. Recroder's Court Judge, 406 Mich. 280 N.W.2d 794 (1979);

Whalen v. United States, 445 U.S. _____ 1980;


## STATUTES CITED


Mo.Rev.Stat.Sec. 559.225

Mo.Rev.Stat.Sec. 571.015

Mo.Rev.Stat.Sec. 560.120

Mo.Rev.Stat.Sec. 556.041

Mo.Rev.Stat.Sec. 556.046


## CONSTITUTIONAL PROVISION CITED


United States Constitution, Fifth Amendment

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IN THE

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NO. 80-997

STATE OF MISSOURI

Petitioner,

Vs.

TOMMY BRYANT KENDRICK, AET AL

Respondent,

BRIEF IN OPPOSITION

TO GRANTING PETITION FOR WRIT OF CERTIORARI

The respondent, TOMMY BRYANT KENDRICK, in opposition to the granting of the petition for writ of certiorari in this case, states as follows:

OPINION BELOW

The opinion of the Missouri Supreme Court in this case is reproduced by the petitioner in its Apendix A to the petition and is before this Court. It also has been reported in the advance sheets to the Southwestern Reporter, State v. Kendrick, 606 S.W.2d 643 (Mo. 1980).

## JURISDICTIONAL STATEMENT

The petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. Sec. 1257(3). The petitioner, however, fails to state in its jurisdictional statement what portion of that statute is purportedly applicable in this case. Presumably, however, the petitioner claims that this Court has jurisdiction to review the holding of the Missouri Supreme Court on the basis that "the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States." Again presumably, it is the Missouri Supreme Court's holding with regard to the "validity" of Mo.Rev.Stat.Sec. 559.225 (Supp. 1976), the armed criminal action statute, which the petitioner feels provides the jurisdictional basis in this Court. However, it is to be noted that the Missouri Supreme Court has not invalidated Section 559.225 [renumbered effective January 1, 1979 as Mo.Rev.Stat.Sec. 571.015 (1979)] and prosecutions under that section are still authorized. Under these circumstances, the jurisdictional statement of the petitioner is inadequate to merit review by this Court.

## QUESTIONS PRESENTED

1. Whether this case presents an issue in a manner that warrants the exercise of the certiorari jurisdiction of this Court?

2. Whether imposing separate punishments in a single state proceeding both for the offense of committing a felony by means of a dangerous and deadly weapon and for the commission of that felony violates the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States, where the highest court of that state has held the state legislature intended to separately punish both offenses but that the two offenses are in law and fact the same offense?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States, in per-

tinent part, reads as follows:

> "No person shall . . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

The statutes defining the underlying felony, armed robbery, Mo.Rev.Stat.Secs. 560.120 (1969) and 560.135 (Supp. 1975), and the armed criminal action statute, Mo.Rev.Stat.Sec. 559.225 (Supp. 1976), have been reproduced by the Missouri Supreme Court in its opinions in State v. Sours, 593 S.W.2d 208, 213-14 (Mo.Banc 1980) and 603 S.W.2d 592, 597-98, n. 5 and 6 (Mo.Banc 1980), both of which figure prominently in this case. The petitioner has also reproduced these statutes in its Appendix C to the petition.

Mo.Rev.Stat.Sec. 556.041 (1978), effective January 1, 1979, provides as follows:

> "When the same conduct of a person may establish the commision of more than one offense he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if
>
> (1) One offense is included in the other, as defined in section 556.046; or
>
> (2) Inconsistent findings of fact are required to establish the commission of the offenses; or
>
> (3) The offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or
>
> (4) The offense is defined as a continuing course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses."

Mo.Rev.Stat.Sec. 556.046 (1978), effective January 1, 1979, provides as follows:

> "1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when
>
> (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
>
> (2) It is specifically denominated by statute as a lesser degree of the offense charged; or
>
> (3) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein.
>
> 2. The Court shall not be obligated to charge the jury with respect to an included offense unless there is a basis for a verdict acquitting the defendant of the offense charged and convicting him or the included offense."

## STATEMENT OF THE CASE

The indictment, filed in the state trial court on November 21, 1979, was in eight counts. The odd-numbered counts alleged the respondent had committed four armed robbery offenses and the even-numbered counts alleged that he had in addition committed four armed criminal action offenses, each of the latter offenses referring to the armed robbery described in the previous count. On December 19, 1979, the respondent was brought to trial on Counts V and VI, the former an armed robbery charge for the robbery of the Safeway store at 4th and Grey in Joplin, Missouri on November 22, 1977 and the latter for armed criminal action relating to the same armed robbery. The trial was completed that day when the jury returned its verdicts finding the respondent guilty of armed robbery and assessing punishment at thirty years and finding him guilty of armed criminal action and assessing punishment at life. On January 2, 1980, the respondent was sentenced in accordance with these verdicts, the sentences running concurrently.

On that same date, January 2, 1980, the respondent pled guilty to the three charges of armed robbery contained in Counts I, III and VII and was sentenced to thirty years on each count. After the pleas of guilty on these counts were accepted, with regard to Counts II, IV and VIII, all derivative armed criminal action charges, the respondent waived trial by jury and stipulated that he was guilty of the robbery charges in Counts I, III and VII and that he had committed those robberies with or through the use, assistance or aid of a dangerous and deadly weapon. Whereupon, the respondent was found guilty by the trial court of armed criminal action as alleged in Counts II, IV and VIII. The respondent was then given three thirty year sentences on the armed robbery convictions and three life sentences on the armed criminal action convictions all of which were made to run concurrently with each other and with the previous sentences imposed on Counts V and VI.

On appeal, the Missouri Supreme Court reversed all four armed criminal action convictions relying upon its opinions in the Sours cases. 606 S.W.2d at 644.

Thereafter, on or about December 15, 1980, the state filed its petition

for writ of certiorari.

REASONS FOR DENYING THE WRIT

1. This case does not present a double jeopardy issue in a manner that warrants the exercise of the certiorari jurisdiction of this Court.

The armed criminal action statute which lies at the very heart of any controversy in this case was renumbered Mo.Rev.Stat.Sec. 571.015 (1978) at the time of the enactment of the new Missouri Criminal Code which was effective on January 1, 1979. Enacted with that code were two new statutes, Mo.Rev.Stat.Secs. 556.041 and .046 (1978), the combined effect of which is to preclude multiple convictions, and consequently multiple punishments, where one offense is included in or a lesser included offense of another. One of the material issues decided by the Missouri Supreme Court in the combined Sours v. State cases was that it was the intent of the Missouri General Assembly, the term used to describe the combined houses, Senate and Legislature, of the legislative branch of the state, to punish separately armed criminal action and the underlying felony. However, that court in the Sours cases also decided that the underlying felony was either an included or lesser included offense of armed criminal action. Insofar as the undersigned is aware, the Missouri Supreme Court has not had to decide as yet whether the legislative intent to limit convictions (and consequently punishments) as contained in Sections 556.041 and .046 overrides the legislative intent to proliferate convictions and punishments as expressed in the armed criminal action statute. Obviously, the Missouri Supreme Court may hold that the legislative intent of Sections 556.041 and .046 overrides the legislative intent of the armed criminal action statute and, if so, prosecutions under the armed criminal action statute for offenses occurring after the effective date of the new Code, January 1, 1979, will not present any double jeopardy issue under the Fifth Amendment. Under these circumstances, this case does not present an issue in a manner that warrants the exercise of certiorari jurisdiction by this Court. Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972).

2. The Double Jeopardy Clause of the Fifth Amendment prohibits imposing separate punishments for two offenses which are in law and fact the same offense even though the punishments are imposed as a result of a single proceeding and even though the legislative intent was that a separate punishment be imposed.

The petition for writ of certiorari filed by the state questions the validity of reversing the respondent's convictions on the even-numbered counts in this case on federal constitutional double jeopardy grounds. It is clear, however, from the facts of the case that regardless of the reasoning, the state supreme court was correct in reversing the convictions on Counts II, IV and VIII. The respondent had previously been convicted of the corresponding armed robberies in Counts I, III and VII by pleading guilty to those counts. Thereafter he was court-tried on Counts II, IV and VIII on the basis of a stipulation. Therefore, there clearly were two proceedings involved with regard to those six counts and therefore the convictions on the even-numbered counts cannot stand. Harris v. Oklahoma, 433 U.S. 682 (1977). The question therefore is whether it was a violation of the Fifth Amendment Double Jeopardy Provision to convict the respondent of Counts V and VI.

In this case with regard to Counts V and VI, there was a single proceeding as a result of which the respondent received multiple punishments for armed robbery and armed criminal action, the two offenses arising out of but one incident or transaction. The Missouri Supreme Court has defeinitively decided two issues in the Sours cases which this Court may not disturb:

1. It was the intent of the Missouri General Assembly that separate and multiple punishments be imposed for armed criminal action and the underlying felony.

2. Every element of the underlying felony is included in Armed Criminal Action; this is, proof of the underlying felony does not requre proof of any additional fact not needed to prove armed criminal action; that is, armed criminal action includes the underlying felony; that is, armed criminal action and the underlying felony are in law and fact the same; and that is, armed

criminal action is the "same offense" as the underlying felony for double jeopardy purposes. E.g., Whalen v. United States, 445 U.S. _____ (1980); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1973); O'Brien v. Skinner, 414 U.S. 524 (1973); Eastlake v. Forrest City Enterprises, Inc., 426 U.S. 668 (1976); Garner v. Louisiana, 368 U.S. 157 (1961).

Assuming that the respondent has adequately stated the two fundamental issues of state law decided by the Missouri Supreme Court in the combined Sours cases, the phraseology used by the petitioner in stating its version of the "questions presented" here and much of the argument for granting the writ is confusing. The constitutional issue is not one involving multiple "convictions" but one involving multiple "punishments." It is true that, after holding that the respondent could not be punished for both armed robbery and armed criminal action, the Missouri Supreme Court vacated and set aside the "convictions" for armed criminal action. However, in this state there can be no "conviction" unless there is an imposition of a sentence of punishment. See State v. Frey, 459 S.W.2d 359 (Mo. 1970); State v. Crate, 493 S.W.2d 1 (Mo.Ct.App. at St.L. 1973). This rule of Missouri law is important for this Court's study of the Sours cases and Hunter v. State, 420 A.2d 119 (Del.Supr. 1980) (advance sheet). In the latter case, the Delaware Supreme Court was faced with the same multiple punishments-double jeopardy issue contained in this case and its findings on that issue paralleled the findings of the Missouri Supreme Court in the two Sours cases, except that the Delaware Court affirmed the multiple convictions but set aside the multiple sentences. In the respondent's view, the rule of Missouri law noted above is the most likely reason the Missouri Supreme Court did not allow the multiple "convictions" to stand and explains the difference in result in the Hunter case and the Sours cases. It is to be noted that the two state supreme courts reached their decisions independently one from the other and that each court decided that this Court's decision in the Whalen case had not reduced the Fifth Amendment guarantee against multiple punishments to a question of mere legislative intent.

At any rate, the emphasis the petitioner puts on "convictions" in presenting the questions in the case and arguing the case is unwarranted. The

case insofar as Counts V and VI are concerned involves a question of the reach of the Fifth Amendment's guarantee against multiple punishments for the same offense. The framework in which the question must be decided is as follows: (1) the punishments result from offenses which arose out of the same act, incident or transaction; (2) it was the legislature's intent to punish each offense separately; (3) there was but one legal proceeding; and (4) the offenses are in law and fact the same offense. Thus, the constitutional question in that framework is whether the multiple punishments imposed for the two (but same) offenses violate the guarantee against multiple punishments contained in the Double Jeopardy Clause of the Fifth Amendment.

The petitioner claims that this Court has given a definitive answer to this question in Whalen and because of the dismissal for want of a substantial federal question in Brinkley v. Michigan, _____ U.S. _____ (1979). The decision in Whalen, however, is clearly based upon a finding of legislative intent and does not measure the reach of the protection against multiple punishments. The case underlying Brinkley is cited as Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 280 N.W.2d 794 (1979). In the latter case, the Michigan Supreme Court was constuing a felony firearms statute and the underlying felony, in Brinkley's case armed robbery. The petitioner has reproduced these statutes in its Appendix D to the petition. In essence, at least as is important here, the Michigan court held the felony firearms statute created a separate and distinct crime from the underlying felony so that the two offenses were not the same. As the respondent perceives it, this holding by the Michigan court was conclusive on the issue of whether the two offenses were the same for double jeopardy purposes and therefore this Court, not being free to place a contrary construction on state statutes, could find no substantial federal question. (It is true that if the rule in Blockburger v. United States, 284 U.S. 299 (1932) is one of constitutional dimension and if that rule were to mandate the reasoning of the majority in Whalen v. United States, supra, 63 L.Ed.2d 715, 725, concerning felony murder and the underlying felony, there would clearly have been a substantial federal question in Brinkley. However, Whalen has placed the status of the Blockburger rule

in question and, furthermore, there appears to be no settled precedent that the reasoning of the majority on felony murder and the underlying felony is constitutionally mandated. But see Harris v. Oklahoma, supra. It is to be noted, however, that in this case the holding of the Missouri Supreme Court that armed criminal action and armed robbery are, for double jeopardy purposes, the "same offense" does not concern the status of the Blockburger rule. That holding is based on the state court's construction of state laws. Even if this Court were to disagree with that holding on constitutional grounds, the Court would be unjustified in disturbing the holding as there is no constitutional deprivation resulting from the holding. Thus, the status of the Blockburger rule is not involved in this case.)

In sum, it appears this Court has not definitively addressed the multiple punishments-double jeopardy question in this case. But see Missouri v. Sours, _____ U.S. _____ (1981) with regard to this question, the Missouri Supreme Court has fully reviewed and considered the opinions of this Court. Sours v. State, supra, 593 S.W.2d at 211-14, 218-21 and Sours v. State, supra, 603 S.W.2d at 603-606. Citations to prior opinions of this Court are contained in the thorough analysis of the Missouri court. Also, see Hunter v. State, supra. The respondent can neither improve on nor add to the analysis of the constitutional question made by the Missouri and Delaware courts. In sum, the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States prohibits Missouri from punishing the respondent twice for the same offense. In the framework of this case, armed robbery (Count V) and armed criminal action (Count VII) are the same offense. Therefore, the repondent may not be punished for both offenses. The jurists in Hunter v. State, supra, 420 A.2d at 128 saw the analysis they gave the question as constituting "settled law on the subject of double jeopardy." They present present persuasive arguments as to why multiple punishments should be disallowed.

> "It is argued that the differences between punishment for the same offense via the vehicle of two statutes and enhanced punishments by one statute, which is clearly constitutional, is illusory. We disagree. Punishment for the same offense via two separate statutes does more than merely cumulate punishment for that one offense. It has profound collateral effects on parole considerations, future treatment as an habitual offender, and may lead to harsher sentences for later offenses . . . .
>
> * * * *

"We are of the opinion that the Double Jeopardy Clause was intended to prevent double punishment regardless of the procedural context in which it is found. We can find no sound basis, in Whalen or elsewhere, to exempt the Legislature from adherence to this constitutional doctrine in the instant case. Multiple sentences in the same trial for the same act are equally as abhorrent to the constitutional guarantee, in our view, as multiple sentences for the same act resulting from multiple trials."

Id. at 10.

The Missouri Supreme Court also declined to make any ruling which would free the Missouri General Assembly to "impose separate punishments for two crimes that constitute the same offense under the traditional same evidence test."

"We believe that such a ruling would abolish the traditional double jeopardy protection against multiple punishments for the same offense. It would require bifurcation of the meaning of 'same offense' under the double jeopardy clause. It would grant the state legislature the power to define the meaning of 'same offense as used in the double jeopardy clause of the Constitution, a traditional judicial function. The implicit effect of such a holding would be that the double jeopardy clause would hereafter be only a limitation on the executive and judicial branches, but not on the legislative branch of government. We do not believe that it is appropriate for this Court to make such a ruling. If such a ruling is to be made, it is the responsibility of the United States Supreme Court to make it."

603 S.W.2d at 606.

In fact, if the issue of whether multiple punishments for the same offense can be imposed is reduced to an issue of legislative intent, it may no longer be said that there are three separate constitutional protections in the guarantee against double jeopardy. There would never be need to invoke the third protection, the protection against multiple punishments for the same offense. See, e.g., North Carolina v. Pearce, 395 U.S. 711 (1969); United States v. DiFrancesco, 66 L.Ed.2d 328 (1980).

Because there was only one criminal proceeding in this case, one of the primary objectives of the double jeopardy guarantee - that of prohibiting a second proceeding - is not involved. Surely prohibiting multiple punishments for the same offense is another basic thrust or purpose of that guarantee. Surely, "the prosecution may not do in one trial what is prohibited from doing in two trials." Elmore v. State, 382 N.E.2d 893, 894-95 (Ind. 1978). Here, the state could not convict and punish the respondent for one of the two offenses (Counts V and VI) at one criminal proceeding and then convict and punish

him for the second of the two offenses at the second criminal proceeding. Harris v. Oklahoma, supra. If the state were to be allowed to do in one proceeding what the state may not do in two proceedings, form would be clearly be exalted over substance. It is said that in this area of constitutional law, the "exaltation of form over substance is to be avoided." United States, v. DiFrancesco, supra, 28 Cr.L. at 3025.

So let it be.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

David Robards peh

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PUBLIC DEFENDER

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